Supreme Court, U.S.
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No. 99-1683

In The

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Petitioners,

v.

MATT GAFFEY, States Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Two parties and one amicus curiae have responded to the Yankton Sioux Tribe's petition for a writ of certiorari, and this reply will respond to the arguments in each of those responses.

I. YANKTON SIOUX REPLY TO STATE OF SOUTH DAKOTA

The Eighth Circuit Court of Appeals made two primary holdings in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999) (hereinafter *Yankton II*). The Court held:

1. The Yankton Sioux Reservation was not disestablished by congressional act in 1894.
2. The Yankton Sioux Reservation was further diminished after 1894 as individual allotments passed out of Indian hands.

In its petition for a writ of certiorari, the Yankton Sioux Tribe seeks review of the latter of these two holdings, but not the former. The Tribe's petition shows that if the Reservation was not disestablished, then under prior decisions of this Court, and under 18 U.S.C. § 1151, allotments continue to be part of the Reservation. The Tribe also demonstrates that correction of the Court of Appeals error is of exceptional importance.

The state does not and cannot dispute the Tribe's argument on these points. The State does not dispute that holding 2 above is inconsistent with prior decisions of this Court.[1] The State also does not dispute the importance of the issue raised by the Tribe.

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[1] The Tribe also argued the Court of Appeals decision was inconsistent with *Ute Indian Tribe v. Utah*, 114 F.2d 1513 (10th Cir. 1997). The inconsistency with *Ute Indian Tribe* is premised upon the continued existence of the Yankton Reservation after 1894. Because the State concedes that, if the Reservation continues to exist after 1894, the Eighth Circuit Court of Appeals decision is inconsistent with Supreme Court case law, it is not necessary to

Instead the state correctly points out that the Tribe's argument is explicitly premised on the Court of Appeals determination that the Reservation continued to exist after 1894, and the state repeats its flawed attack upon that premise. The State's argument that the Yankton Sioux Reservation was disestablished is based upon its contention that this case is indistinguishable from *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Because the State's response merely repeats the argument contained in its petition, the Tribe refers the Court to the Tribe's responses to the State's petition.[2] As discussed in detail in that response, the Court of Appeals distinguished this matter from *DeCoteau* on three separate bases, and the State argues those distinctions are based upon erroneous findings of fact. The State also alleges the Court of Appeals misapplied a properly stated rule of law. The errors alleged by the State do not merit review by this Court. Sup. Ct. R. 10.

The United States response to the State provides further basis to reject the State argument. The United States provides a detailed analysis of the history of the negotiation of the Sisseton and Yankton agreements, to show the differences between this matter and *DeCoteau*. While the United States response provides an excellent analysis, they miss a key point with regard to the Yankton Sioux's understanding of sale of land for a sum certain. Under this Court's precedent, treaties with Indians are to be interpreted to give effect to the terms as the Indians themselves would have understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Such interpretation requires the Court to look to the

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determine whether it is also inconsistent with decisions of another Circuit Court of Appeals.

[2] The Tribe also refers the Court to the State's reply to the Tribe's response. In its reply, the State does not attempt to counter the well-reasoned arguments of the Tribe with regard to the distinction between this matter and *DeCoteau*.

specific history of negotiation, including events which shed light on the contemporaneous understanding of the agreement. *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Solem v. Bartlett*, 465 U.S. 463, 469 (1984).

Applying those principles to the history of negotiation in this case, the Yankton Sioux understood that sale of land for a sum certain did not disestablish a Reservation. The Yankton agreement was made two years after the agreement at issue in *DeCoteau*, and the negotiator for the United States told the Yankton Sioux that the Lake Traverse Reservation continued to exist after the Sisseton sold their land for a sum certain.[3] While this Court subsequently determined that the Lake Traverse Reservation was disestablished in 1891, the contemporaneous understanding of the Yankton Sioux in 1892 was that the Lake Traverse Reservation continued to exist after the sale, and so the Yankton Sioux would believe that if they sold their surplus land for a sum certain, their reservation would continue to exist.

The State argument to the contrary is not based upon the contemporaneous understanding of the Yankton Sioux. It is based upon a decision by this Court over 80 years after the Yankton Sioux sold their surplus land. The state's attempt to impute this Court's conclusion in *DeCoteau* to the Yankton Sioux in 1892 is contrary to this Court's precedent.

This Court should reject the State's sole argument against the Tribe's petition for a writ of certiorari, and

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[3] Col. Adams stated to the Yankton Sioux "Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from the line of the Sisseton. Right here lives a friend of mine by the name of Vick, just outside the Reservation line. Just inside of the line of reservation lives an Indian friend of mine named Chunek." Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 72.

should then correct the undisputed error of the Court of Appeals.[4]

II. YANKTON SIOUX REPLY TO RESPONSE OF AMICUS CITIES

The cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner amicus curiae (amicus cities) filed a brief in support of the State's position. Like the State, the cities' brief does not respond to the issue raised in the Tribe's petition for certiorari.

Section IIA of the cities' brief is the only section which purports to respond to an argument of the Yankton Sioux Tribe.[5] The cities' state that, on page five of the Tribe's petition, the Tribe makes certain arguments regarding the 1858 boundaries of the Yankton Sioux Reservation. The cities then argue that the Tribe's argument on page five is inconsistent with other arguments of the Tribe. Cities' Brief at 7, 8. Page five of the Tribe's petition is devoted to a procedural history of the case, and does

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[4] Assuming the Court does not review the determination that the Reservation continued after 1894, the Court could dispose of this manner by summary disposition, reversing the unprecedented Circuit Court's determination that the Reservation continues to diminish after 1894 as general allotments pass to non-Indians. The State has presented no argument which supports the Circuit Court decision, and they would not be able to present such argument if the Court allowed full briefing on the issue.

If the Court were to grant the State's petition for a writ of certiorari, it would then need to also grant the Tribe's petition. Unless the Court were to find the Yankton Sioux Reservation disestablished, it would have to reverse the Court of Appeals determination regarding the effect of allotment.

[5] The cities' brief is divided into sections I, IIA, and IIB. Sections I and IIB are responses to the United States. The tribe will not respond to the cities' conjecture regarding the motives of the United States or the cities' mischaracterization of the position of the United States.

not contain any argument or discussion of the Tribe's position. The cities' argument is based upon fabrication of, and mis-characterization of, the Tribe's argument. Their brief does not make any argument against granting of the Tribe's petition.

III. YANKTON SIOUX REPLY TO UNITED STATES BRIEF IN OPPOSITION TO WRITS OF CERTIORARI

In its brief, the United States makes four major arguments. The Solicitor General argues:

> 1. The Circuit Court correctly held that the Yankton Sioux Reservation has not been disestablished, and that ruling is not in conflict with *DeCoteau* or *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999).
>
> 2. The Circuit Court ruling that the Reservation has not been disestablished is not a matter of sufficient importance for Supreme Court review.
>
> 3. The Circuit Court incorrectly held that the Yankton Sioux Reservation was further diminished (and continues to diminish at present) when Indian allotments passed (and continue to pass) to non-Indian hands after the 1894 congressional action at issue.
>
> 4. The Circuit Court decision that the Reservation had been further diminished after 1894 is not a matter of sufficient importance to merit Supreme Court review.[6]

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[6] The United States also devotes a footnote to its inventive, but obviously incorrect, argument that the Court of Appeals decision is not contrary to 18 U.S.C. § 1151(a). The State of South Dakota and amicus cities did not even support the United States argument on that point.

The Yankton Sioux Tribe agrees that the first three of these arguments are correct, but disagrees with contention four, above. In its petition for a writ of certiorari, the Tribe discussed the importance of this case. The Tribe's response to the United States will demonstrate the error of the U.S. argument that the issue raised by the Tribe is not of sufficient importance to merit Supreme Court review.

In its decision, the Court of Appeals erroneously held that allotments, which it found were Reservation in 1894, ceased to be Reservation after 1894. The disagreement between the United States and the Tribe is whether the clear Court of Appeals error is limited to the 1894 Act at issue, or whether the error applies to allotments under the General Allotment Act of 1887.

If the Court of Appeals error is based upon a misinterpretation of the intent of the General Allotment Act, then this case is of exceptional importance. The case would, in fact, be the most important change in the definition of "Indian Country" in at least the past 100 years. Neither the United States, nor the State of South Dakota, nor the amicus cities, contest the importance of the Court of Appeals decision if that decision is based upon the General Allotment Act.[7]

Based upon its own interests, and its responsibilities to all Indian tribes, the United States seeks a narrow interpretation of the Court of Appeals error, arguing that *Yankton II* is based upon facts unique to the 1894 Act, and not facts generally applicable under the General Allotment Act. Unfortunately for Indian tribes throughout the

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[7] As discussed in the Tribe's petition, pp. 11-14, it is also indisputable that the Circuit Court decision is contrary to this Court's interpretation of the effect of allotment under the General Allotment Act. This Court has repeatedly held that allotments under the General Allotment Act did not cease to be reservation land, notwithstanding the issuance of any patent. *See also* 18 U.S.C. § 1151(a).

United States, that narrow interpretation is not supported by the Court of Appeals decision.[8]

A. Interpretation of the Reservation status of General Allotments is based upon the intent of the General Allotment Act, not based upon intent of the 1894 Act.

Contrary to the position of the United States, this Court, in *Mattz v. Arnett*, 412 U.S. 481 (1973) rejected a fact-specific test to determine whether General Allotments which are part of a reservation cease, at some later point in time, to be reservation. Like the United States in this matter, the respondent in *Mattz v. Arnett* attempted to interpret the effect of allotment based upon negotiation history unique to its case. In rejecting that argument, the Court wrote:

> The respondent relies upon what he feels is significant language in the Act and upon references in the legislative history. . . .
>
> We conclude however, that this is a misreading of the meaning of the effect of the allotment provisions in the 1892 Act. The meaning of those terms is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388.
>
> . . .
>
> . . . Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotments. The

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[8] It is telling that the State of South Dakota does not follow the lead of the United States and argue the case is of limited importance. The Tribe's petition, pp. 17-19, explained the legally correct argument which states will make based upon *Yankton II*, and the State does not disavow that argument. They do not suggest the case is of limited importance, and they remain poised to take advantage of the important error of the Court of Appeals.

> 1892 Act was but one example of this. Its allotment provisions, which do not differ materially from those of the General Allotment Act of 1887, and which in fact refer to the earlier act, do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation. Rather, allotment under the 1892 Act is completely consistent with continued reservation status.

Id. at 496.

Similar to *Mattz*, the 1894 Act is special legislation enacted to carry out the General Allotment Act. The allotments at issue in the captioned matter were made under the General Allotment Act. In fact, most allotments on the Yankton Sioux Reservation were made prior to the 1892 agreement and the 1894 Act which congressionally approved the 1892 agreement. *Yankton II*, at 1013, n.3; 14 F. Supp. 2d at 1140-41. *Cf. DeCoteau, supra.* (Special legislative act allowed for additional allotments beyond those provided for in General Allotment Act.)

Whether the allotments cease to be Reservation is therefore to be determined by this Court's well-established interpretation of the underlying General Allotment Act, not based upon the unique 1894 Act or the unique negotiation history with the Yankton Sioux Tribe. *Mattz, supra.* As discussed in the Tribe's petition, and not disputed by the United States, this Court's holding has consistently been that allotments continue to be Reservation, notwithstanding the issuance of any patent. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984).

While other areas of the 1894 agreement turn on the specific facts of the 1894 agreement, the effect of allotment is based upon the general principles of General Allotment Act. The Court of Appeals reinterpretation of

the effect of allotment under the General Allotment Act is therefore of enormous significance.[9]

B. *Yankton II* did not determine the effect of allotment based upon facts unique to this case.

In its response, the United States asserts that "the Court of Appeals relied upon provisions of the 1894 Act, 'when read in its full historical context,' that anticipated that tribal members would eventually receive fee title to their allotments." *U.S. Response* at 26. The text of the Court of Appeals decision makes clear that the "full historical context" is the General Allotment Act itself. The Court wrote: "Some articles of the [1894] Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the state or territory in which he resided."

The Court of Appeals also stated:

> "Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist and on the belief that allotting lands and purchasing those left unallotted were steps in the process of eventually dismantling the reservation system."

Yankton II, at 1018.

It was the General Allotment Act which provided for allotment of the Reservation. The 1894 Congress's "assumption" that allotments would eventually be held in fee and subject to state jurisdiction is based upon the

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[9] As the above discussion shows, if the United States were correct that the Court of Appeals determined the effect of allotment on facts unique to the 1894 agreement, that would be contrary to *Mattz*. The argument of the United States therefore does not support denial of a writ of certiorari. It supports certiorari, while interpreting *Yankton II* in a manner other than the Tribe's interpretation. As discussed below, the Tribe's interpretation is the correct interpretation of *Yankton II*.

explicitly statutory provisions of the General Allotment Act, and the assumption was not based upon any fact unique to the 1894 Act. Under the General Allotment Act, Yankton Sioux tribal members received trust patents to land, and the General Allotment Act provided that, after a 25 year trust status, Indians would receive fee patents. The "full historical context" referred to by the Court is not unique to the Yankton Sioux Reservation.[10]

While the United States wishes this case were of limited significance, the allotments at issue were made under the General Allotment Act, and the Court of Appeals decision breaks with prior case law interpreting the effect of General Allotment. This case is therefore of substantial importance, and this Court should grant certiorari on the questions presented by the Yankton Sioux Tribe.

CONCLUSION

The State of South Dakota and the amicus cities do not present any argument against granting the Tribe's petition for a writ of certiorari. Instead, they use their responses to further argue that the State petition should be granted. The United States presents an argument against granting the Tribe's petition, but their argument is based upon an incorrect interpretation of the Court of Appeals decision.

The Court should grant the Tribe's petition for a writ of certiorari.

Respectfully submitted,

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[10] In contrast, when the Court discusses the historical context with regard to whether the Reservation was disestablished (the issue the State asks this Court to review), the detailed Court analysis is based upon facts unique to the Yankton Sioux agreement.